88-1670

No.

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1988

AMERICAN AIRLINES, INC., DELTA AIR LINES, INC., NORTHWEST AIRLINES, INC., TRANS WORLD AIRLINES, INC., UNITED AIR LINES, INC., and USAIRLINES, INC.,

Petitioners,

v.

THE CITY OF CHICAGO; EUGENE SAWYER, in his official capacity as Acting Mayor of the City of Chicago; HOWARD STANBACK, in his official capacity as Commissioner of the Department of Aviation of the City of Chicago,

Respondents.

CROSS-PETITION OF AMERICAN AIRLINES, INC., DELTA AIR LINES, INC., NORTHWEST AIRLINES, INC., TRANS WORLD AIRLINES, INC., UNITED AIR LINES, INC., and USAIRLINES, INC., FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether, if footnote 14 of *City of Burbank v. Lockheed Air Terminal, Inc.* (411 U.S. 624, 626) did establish a "proprietorship" exception to federal pre-emption of local control of aircraft noise and pollution, the subsequently enacted explicit pre-emptive provision of 49 U.S.C. §1305(a)(1) precludes all suits under State law for any remedy in damages (such as, class suits for massive continual recoveries on the ground of continuing trespass) the purpose and/or result of which is to affect the "rates, routes or services" of defendant airlines.

2. Whether such federal pre-emption of noise control as exists prohibits State action in respect to all matters of air space management (in-flight operations or flight patterns and schedules) and permits State action only for inverse condemnation or for the negligent use and maintenance of ground facilities.

PARTIES TO THE PROCEEDINGS BELOW

The caption of the case contains the names of all parties, except the airlines who were defendants-appellees below, namely, American Airlines, Inc., Delta Air Lines, Inc., Northwest Airlines, Inc., Trans World Airlines, Inc., United Air Lines, Inc., and USAirlines, Inc.*

* Listing of parent companies, subsidiaries and affiliates: American Airlines, Inc. (AMR Corp., Equitable Life Assurance Society of United States); Delta Air Lines, Inc. (none); Northwest Airlines, Inc. (NWA Inc.); Trans World Airlines, Inc. (Arrow Limited Partnership c/o Icahn Holding Corp.); United Air Lines, Inc. (Allegis Corporation, The Boeing Company); USAirlines, Inc. (U S Air Group, Inc.); Ozark Airlines, Inc., originally named a defendant, has been merged into Trans World Airlines, Inc.

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THE CITY OF CHICAGO; EUGENE SAWYER, in his official capacity as Acting Mayor of the City of Chicago; HOWARD STANBACK, in his official capacity as Commissioner of the Department of Aviation of the City of Chicago,

Respondents.

CROSS-PETITION OF THE AIRLINE DEFENDANTS-APPELLEES BELOW FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The airlines who were defendants-appellees below—*i.e.*, American Airlines, Inc., Delta Air Lines, Inc., Northwest Airlines, Inc., Trans World Airlines, Inc., United Air Lines, Inc., and USAirlines, Inc.—cross-petition under Rule 19.5 of this Court for a writ of certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion below is reported at 864 F.2d 463 and is contained in the Appendix to the respective petitions for certiorari herein of petitioner Lawrence C. Bieneman (plaintiff-appellant below) (No. 88-1497) and of the City of Chicago and its Mayor and Commissioner of Aviation (No. 88-1496).

JURISDICTION

The judgment of the Court of Appeals was entered on December 13, 1988. No rehearing was requested. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The District Court had jurisdiction under 28 U.S.C. §1331.

Cross-petitioners received the Petition for Writ of Certiorari of the City of Chicago on March 15, 1989.

The jurisdiction of this Court to receive this conditional cross-petition for certiorari is invoked under Rules 19.5, 19.6 and 20.5 of this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Cross-petitioners adopt here and refer to the statement of the constitutional and statutory provisions involved as contained in the respective petitions for certiorari of Lawrence C. Bieneman and of the City of Chicago. For convenience of reference in connection with this cross-petition the relevant provisions of 49 U.S.C. §1305(a)(1), enacted as part of the Airline Deregulation Act of 1978, are set forth below:

> ". . . [N]o State [except Alaska] or political subdivision thereof . . . shall . . . enforce any law . . . relating to the rates, routes or services of any air carrier. . ."

STATEMENT OF THE CASE

Cross-petitioners adopt here and refer to the statement of the case contained in the respective petitions for certiorari of Lawrence C. Bieneman and of the City of Chicago and add thereto the following matters relating to the airline cross-petitioners:

The airlines were made defendants to this suit in the District Court and have responded thereto separately from the City in both the District Court and the Court of Appeals because of their separate and separable interest as parties involved directly in the in-flight and air space management aspects of aircraft noise. However, the air-

lines also have an interest in the City's position as airport proprietor. This is so for two reasons:

(1) It is alleged that the airlines, although not liable for the noise their aircraft make in flight while under absolute Federal Air Administration control, are nevertheless suable as co-proprietors ("joint venturers") with the municipal airport owner because of the terms of the Lease/Use Agreements signed by the airlines for the utilization of O'Hare International Airport (similar to the arrangements at all other hub airports) (Appendix to Petition of Lawrence C. Bieneman in No. 88-1497, A. 75-78); and

(2) the Lease/Use Agreements would appear to provide that the airlines will indemnify the City from all liabilities (including attorneys' fees and expenses), other than those resulting from the City's negligence, arising out of "suits alleging a taking of property or interests in property without just compensation, trespass, nuisance or similar suits based upon the use of the airport . . . for the landing and take-off of aircraft. . ." (Appendix to Petition of Lawrence C. Bieneman in No. 88-1497, A. 76-77).

REASONS FOR GRANTING THIS CROSS-PETITION

Not since 1973 (in *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624—hereinafter "*Burbank*") has this Court addressed the problem of balancing what has become a public necessity—commercial air travel—against the property rights of those who—with advertence or by inadvertence—are owners of land affected by the noise of landings and take-offs at the airports which are a necessary part of air transportation. It is time for a current analysis of this preeminently important nation-wide issue, and it is appropriate for this Court to do so in this case where the Court of Appeals has decided a question of federal law—pre-emption of aircraft noise control—which has not been, but should be, settled by this Court. (Rule 17.1(c).)

The airline cross-petitioners support the petition of the City of Chicago. If, however, the Court should grant the petition of the City and if the Court should decide that *Burbank* admits of a proprietorship exception to total federal pre-emption of aircraft noise control, then the Court should address the questions presented by this cross-petition of the airlines. Otherwise, the uncertainty existing from the various judicial decisions which have attempted to define the extent of such an assumed proprietorship exception will continue to plague the national air transportation system.

I.

SECTION 1305(a)(1) OF CHAPTER 49 U.S. CODE IS AN EXPLICIT PRE-EMPTIVE STATUTE, OVER-LOOKED BY THE COURT OF APPEALS, AND PREVENTS ANY STATE COURT SUIT IN WHICH THERE IS A CONTINUING MASS DAMAGES REMEDY AGAINST THE MUNICIPAL AIRPORT PROPRIETOR.

Section 1305(a)(1) prohibits any State suits or judicial remedies "relating to rates, routes, or services" of the cross-petitioning airlines. Having relied on Section 1506 of Chapter 49 of the U.S. Code [A. 18, 21],* enacted long before *Burbank* found it no bar to pre-emption, the Court of Appeals failed to realize that §1305(a)(1), enacted in 1978, *is* the explicit pre-emption provision which was assumed to be lacking here.

Accordingly, the lower court's discussion of how "excessive awards", even though as effective as injunctive action in regulating conduct, are not pre-empted [A. 21] is basically flawed. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 246-7 (1959).

The purpose and design of these purported class actions against the municipal airport proprietor for massive and never-ending damages for continuing trespass (*Baker v. Burbank-Glendale-Pasadena Airport*, 705 P.2d 866 (Cal. 1985), *cert. den.* 475 U.S. 1017 (1986)), is to control the emission of aircraft noise. It is unrealistic for the Court of Appeals to say that "Bieneman wants damages, not regulation" [A. 20]. An inverse condemnation award would meet that need. Rather, what Bieneman wants is to regulate aircraft noise by controlling the routes and services

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* Appendix references are to the Appendix to the Petition of the City of Chicago, et al., in No. 88-1496.

of the major airlines using O'Hare (the nation's busiest hub airport) by and through the threat of oppressive and continuing nuisance damage recoveries. Any liability of the Airport under State law for continuing nuisance, if passed on to the airlines under their Lease/Use Agreements, would cause the airlines to curb their routes and services and to raise their rates to the public.

To permit such suits and "allow [Illinois] courts some role in setting noise levels at O'Hare" [A. 20] by means of homeowners extorting changes in airport access, airline scheduling, types of aircraft used, etc., through the threat of massive damage remedies is clearly banned by §1305(a)(1), which applies to common law remedies in judicial proceedings as well as to other types of State action relating to rates, routes or services. *O'Carroll v. American Airlines, Inc.*, 863 F.2d 11, 13 (5th Cir. 1989); *Illinois Corporation Travel v. American Airlines, Inc.*, 682 F.Supp. 378, 379 (N.D. Ill. 1988).

II.

THIS COURT SHOULD CLARIFY FOR ALL LOWER COURTS, STATE AND FEDERAL, THAT IF *BURBANK* AND SECTION 1305(a)(1) DO NOT PRE-EMPT THE ENTIRE FIELD OF AIRCRAFT NOISE CONTROL, THE ONLY MATTERS NOT PRE-EMPTED FROM STATE CONTROL ARE THOSE CONFINED TO AIRPORT LAND MANAGEMENT.

The law of federal pre-emption of aircraft noise control has developed primarily through judicial decision. Since *Burbank* various courts have given differing dimensions to the alleged "proprietorship exception".* For example,

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* In none of these cases, except the case at bar and the Illinois decision upholding complete pre-emption (*Bryski v. City of*

(Footnote continued on following page)

compare, Air Transport Association of America v. Crotti, 389 F.Supp. 58, 65 (D.C. N.D. Cal. 1975) (3 judge court) (State "regulations of noise levels which occur when an aircraft is in direct flight" are pre-empted, but passive noise monitoring procedures innocuous to aircraft traffic and not in conflict with federal regulations are permissible) *and Greater Westchester Homeowners Association v. City of Los Angeles*, 603 P.2d 1329, 1331 (Cal. 1979), *cert. den.* 449 U.S. 820 (1980) (federal government has exclusive control over aircraft "in flight", and proprietor retains responsibility for the proper construction, operation, and maintenance of ground facilities and for land use planning designed to minimize the effects of noise); *with, Owen v. City of Atlanta*, 277 S.E.2d 338, 340 (Ga. Ct. of App. 1981) ("the fact that the location and altitude of landing operations is subject to Federal control does not in any manner determine whether the rights of a surface owner

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* *continued*

Chicago, et al., 499 N.E.2d 162 (Ill. App. 1986), *leave to appeal denied*, 505 N.E.2d 351 (Ill. 1987)), were airlines sued as defendants. Most of the cases make it expressly clear that airlines are not subject to State damage remedies, because their aircraft engines make noise only when "in-flight" under exclusive federal control, from departure gate to arrival gate. See, *San Diego Unified Port District v. Gianturco*, 651 F.2d 1306, 1315, n. 22 (9th Cir. 1981), *cert. den.* 455 U.S. 1000 (1982), for citation of authorities to this effect. Subsequent to the decision in *Owen v. City of Atlanta*, 277 S.E.2d 338 (Ga. Ct. of App. 1981), *aff'd* 282 S.E.2d 906 (Ga. 1981), *cert. den.* 456 U.S. 972 (1982), which found a "proprietorship exception" and denied pre-emption in a suit against the Atlanta Hartsfield Airport, the same court upheld the dismissal of a homeowners' suit against seven airlines "to recover damages for alleged noise and air pollution and for trespass from aircraft overflight." Citing its former *Owen* decision and *Burbank*, the court held that "Federal law and regulations preempt local control of airspace management, air traffic control, and aircraft noise and emissions." (*Adams v. City of Atlanta*, 322 S.E.2d 730, 732 (Ga. 1984).

have been violated by such flights") *cert. den.* 456 U.S. 972 (1982) *and Ursin v. New Orleans Aviation Bd.*, 506 So.2d 947, 955 (La. Ct. of App. 1987) (airport proprietors are responsible for maintaining reasonable levels of aircraft noise through regulation, and failure adequately to control aviation noise necessarily results in compensible injuries either in inverse condemnation if there is a "taking" or in damages for nuisance) *rev'd on other grounds* 515 So.2d 1087 (La. 1987).

The court below ruminates on this question (A. 22-23), and the examples given of pre-emption pretty well bear out the obvious and critical distinction that air space management (the in-flight operation of the aircraft from engines on at departure gate to engines off at arrival gate; the number of flights into the airport; the type of aircraft permitted access; the take-off or landing glide path, etc.) is and must be pre-empted. On the other hand, certain limited matters do not impinge upon in-flight operations, airline routes and scheduling, or airline services, such as matters of airport land management relating to condemnation claims (*e.g.*, buffer zone creation; careful runway placement, etc.) or such as matters of airport maintenance relating to claims of negligence in the use or operation of airport anti-noise equipment (*e.g.*, noise baffles).

With the existing uncertainty of judicial standards in the lower courts throughout the nation, the issue of the extent of the federal pre-emption of aircraft noise control is an important question of federal law raised by the decision below which has not been, but should be, settled by this Court.

CONCLUSION

If the petition for certiorari of the City of Chicago is granted, this cross-petition should be granted in order to clarify an important area of federal law which has not been, but should be, settled by this Court.

Respectfully submitted,

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